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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

A school district in the state of New York makes its facilities available for community use for "civic, social, and recreational" purposes but forbids use by any group "for religious purposes." The pastor of a local church applied for permission to use school facilities to show a film series about family issues. The school district has denied permission because of the religious content of the film series.

1. Did the Second Circuit err in holding, in conflict with the First, Third, and Fifth Circuits, that a public school district may deny equal access to the use of its facilities during non-school hours solely on the basis of the religious content of the would-be user's speech, without violating with the First Amendment?

2. Did the Second Circuit err in holding, in conflict with the First, Third, Fourth, and Fifth Circuits, that public school facilities that are available for social, civic, and recreational use by the general public are not designated public fora for purposes of the right to free speech under the First Amendment?

3. Is the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech unconstitutional regardless of whether the facilities are "designated public fora," "limited public fora," or "nonpublic fora" for purposes of the right to free speech under the First Amendment?

4. Does the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech violate the Establishment Clause of the First Amendment?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

*Petitioner Lamb's Chapel is a non-profit corporation. It has no parent company or subsidiaries.

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CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
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BRIEF FOR PETITIONERS

DECISIONS BELOW

The decision of the court of appeals is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992) (Pet. App. 1a). The decision of the district court granting summary judgment is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (Pet. App. 16a). The prior decision of the district court denying a preliminary injunction is reported as

Lamb's Chapel v. Center Moriches Union Free School District, 736 F. Supp. 1247 (E.D.N.Y. 1990) (Pet. App. 35a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on March 18, 1992. Petitioners filed their petition for writ of certiorari on June 16, 1992. This Court granted the petition on October 5, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The New York statute governing community use of public school facilities, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1992), is set forth in Appendix D to the Petition for Writ of Certiorari (Pet. App. 52a).

The regulations of the Center Moriches Union Free School District governing community use of public school facilities are set forth in Appendix E to the Petition for Writ of Certiorari (Pet. App. 56a).

STATEMENT OF THE CASE

This is a case about official content-based and viewpoint-based censorship of religious speech from a forum opened for general social, civic, and recreational use by the public.

Respondent Center Moriches Union Free School District makes its physical facilities available, during non-school hours, for social, civic, recreational, and other activities by members of the local community, but explicitly forbids use "by any group for religious purposes." Rules and Regulations for Community Use of School Facilities [hereinafter, "Rules & Regs."] ##7, 10 (Pet. App. 57a). Petitioners, a church and its pastor, have applied to use Center Moriches school facilities in order to show a film series, "Turn Your Heart Toward Home," by Dr. James Dobson. The school district has denied permission solely because of the religious content of the film series.

In the present action, petitioners seek injunctive and declaratory relief, under 42 U.S.C. § 1983, against the denial of their right to access, on equal terms with other members of the community, to the use of public school facilities.

A. Statement of Facts

Respondent Center Moriches Union Free School District (hereinafter "Center Moriches") is a political subdivision of the State of New York duly organized to provide public education in Suffolk County. Center Moriches controls the use of various public school facilities including auditoriums, cafeterias and other meeting rooms.

New York state law authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." N.Y. Educ. Law § 414(1)(c) (McKinney 1988 & Supp. 1992) (Pet. App. 52a).

Pursuant to this statute, Center Moriches has adopted official rules governing community use of school district facilities. These rules explicitly authorize permits for, *inter alia*, "social, civic, or recreational use" when "non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." Rules & Regs. #10 (Pet. App. 57a). Center Moriches has regularly granted permission to a multitude of groups to conduct activities in school facilities,[1] including the following (taken from the years 1987 through 1990):

Manorville Humane Society (J.A. 125)
Holiday Beach Property Owners Assoc. (J.A. 156)
Moriches Bay Civic Association (J.A. 121)
Unkechaug Dance Group (J.A. 97)
Moriches Choral Society (J.A. 159)
H.E.L.P. (Helping Every Living Person) (J.A. 123)
Chamber of Commerce (J.A. 146)
Center Moriches Co-op Nursery School (J.A. 158)
Custodial Dep't Labor Union (J.A. 30)
Cub Scout Pack 23 (J.A. 112)
PK Dance School (J.A. 149)

[1] The heavy, ongoing use of school facilities for a potpourri of activities by both school groups and outside organizations is plain from the record. During the week of Dec. 5-11, 1988, for example, there were twenty entries on the Center Moriches calendar for approved and scheduled uses of school district facilities. Plaintiffs' Ex. 3 (J.A. 36). This week was by no means atypical. *See id.* (J.A. 43) (March 13-19, 1989—18 uses); Plaintiffs' Ex. 4 (J.A. 55) (Nov. 13-19, 1989—23 uses); *id.* (J.A. 66) (Feb. 5-11, 1990—26 uses).

Committee on the Busing Vote (J.A. 129)
Center Moriches Free Public Library (J.A. 130)
Moriches Pa-Qua-Tuck Squaws (J.A. 160)
Hampton Council of Churches/Family Counseling Services (J.A. 93)
Moriches Bay Power Squadron (J.A. 162)
Moriches Youth Organization (J.A. 135)
St. John the Evangelist Church (J.A. 164)
Music Department/Salvation Army (J.A. 95)
Center Moriches PTA (J.A. 120)
Southern Harmonizers (J.A. 96)
Brownie Troop # 1719 (J.A. 122)
Brookhaven Kennel Club (J.A. 138)
V.F.W. (Veterans of Foreign Wars) (J.A. 169)

Plaintiffs' Exs. 3, 9a, 11a, 12a, 14, 20-22.

The activities these various groups have conducted on school facilities have been likewise multitudinous, including:

—organizational meeting (J.A. 119)
—magic show (J.A. 153)
—musical rehearsal (J.A. 159)
—political organizing (J.A. 129)
—auction (J.A. 160)
—family counseling (J.A. 133)
—fall festival (J.A. 165)
—cultural program (J.A. 175)
—dramatic performance (J.A. 179)
—formation of new organization (J.A. 134)
—athletics (J.A. 114)
—concert (J.A. 117)
—support group (J.A. 127)
—party (J.A. 130)
—instructional classes (J.A. 138)
—topical speeches (J.A. 174)
—recital (J.A. 149)

Plaintiffs' Exs. 20, 22, 23.

Topics addressed at these gatherings on school facilities have reflected a similar broad diversity, including:

—financial matters affecting property owners (J.A. 156)
—AIDS (J.A. 120)
—helping needy families (J.A. 123)
—getting in touch with children's feelings (J.A. 128)
—maintenance of community civic standards (J.A. 121)
—scouting skills and programs (J.A. 111)
—"psychology and the unknown" (J.A. 99)
—fire prevention (J.A. 115)
—busing petition (J.A. 129)
—youth-coordinating programs (J.A. 132)
—dog obedience (J.A. 138)
—boating safety (J.A. 162)
—baseball (J.A. 174)

Plaintiffs' Exs. 16, 20, 22, 23.

The official rules for Center Moriches, however, expressly forbid use of school premises "by any group for religious purposes." Rules & Regs. #7 (Pet. App. 57a).

Petitioner John Steigerwald was, at all times relevant to this litigation, the pastor of an Evangelical Christian Church, petitioner Lamb's Chapel (Pet. App. 17a).[2]

Pastor Steigerwald applied on two separate occasions for permission to use school facilities to show a film series about family issues. Each time, Center Moriches rejected his application because of the religious content of the film.[3]

[2] Steigerwald is currently associate pastor and a member of the governing board of Lamb's Chapel.

[3] Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning services during 1989. Plaintiffs' Ex. 5a (J.A. 70). On the application Pastor Steigerwald indicated his willingness to abide by the Center Moriches Rules and Regulations "excluding #7" (the ban on use for religious purposes). A school district official replied with a letter, dated Nov. 23, 1988, stating that "in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (see New York Education Law Section 414, which governs the board's

Pastor Steigerwald wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on Dec. 18, 1988, enclosing an application for the use of school facilities for the presentation of a film series featuring Dr. James Dobson.[4] Plaintiffs' Ex. 6a (J.A. 79-80). The series was to be open to the public, free of charge, and was to run in five parts, one evening each week for five weeks. *Id.* On the application form, Pastor Steigerwald noted that the purpose of the film presentation was "Family emphasis" and "to share some prac|tic|al insight about the family." *Id.* Mrs. Schoener replied, in a letter dated Jan. 18, 1989, as follows:

> [W]e are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of a facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film) . . . .

Plaintiffs' Ex. 6b (J.A. 81).

On Feb. 2, 1989, Pastor Steigerwald responded to Mrs. Schoener's request for additional information by sending a brochure describing the planned film series, "Turn Your

position)." Plaintiffs' Ex. 5b (J.A. 78). Pastor Steigerwald has not renewed his request to use school facilities for Sunday services, and his request for such use is not before this Court.

[4] Plaintiffs' Exhibit 6d (J.A. 84) includes a brochure describing the film series. The brochure identifies James C. Dobson, Ph.D., as a licensed psychologist, teacher, author of nine best-selling books, President of Focus on the Family, and host of a daily half-hour radio program broadcast across the country (J.A. 88).

Heart Toward Home." Plaintiffs' Exs. 6c, 6d (J.A. 83, 85). Mrs. Schoener replied, on Feb. 8, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 6d (J.A. 84).

Pastor Steigerwald submitted another request on Oct. 23, 1989, once more seeking the use of school facilities for the Dr. Dobson film series. Plaintiffs' Ex. 7a (J.A. 90). In response, Mrs. Schoener wrote on Nov. 15, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 7b (J.A. 92).

Pastor Steigerwald and Lamb's Chapel would be eligible, in general, to use Center Moriches facilities so long as their activities did not have "religious purposes." Mrs. Schoener testified, for example, that Pastor Steigerwald and Lamb's Chapel would be allowed to use school facilities for athletic purposes. Tr. 71. *See also* J.A. 164 (approved application by church to use school facilities for athletic program). The reason Center Moriches has refused Pastor Steigerwald and Lamb's Chapel access to public school facilities to show a film series on families is the religious perspective contained in petitioners' planned film series. Plaintiffs' Exs. 6b, 6d, 7b (J.A. 81, 84, 92).

There is no evidence that Center Moriches refused any applications to use its facilities prior to rejecting Lamb's Chapel's requests to show a film series.

B. Course of Proceedings

Lamb's Chapel and John Stiegerwald (collectively, "Lamb's Chapel") filed suit in federal district court on February 9, 1990, naming as defendants both Center Moriches Union Free School District and Louise Tramontano in her official capacity as president of the Board of Education for Center Moriches Schools (collectively, "Center Moriches"). Lamb's Chapel requested an injunction requiring Center Moriches to let Lamb's Chapel use

school facilities to show the planned Dr. Dobson film series and forbidding Center Moriches from discriminating against religious groups "because of the religious content . . . of their speech." Complaint ¶ 36 (J.A. 13). Lamb's Chapel also sought a declaration that Center Moriches had created an "open forum," had engaged in unconstitutional content discrimination against Lamb's Chapel's speech and religious beliefs, had violated Lamb's Chapel's federal constitutional rights to free speech, freedom of assembly, equal protection, and free exercise of religion, and had violated the Establishment Clause of the First Amendment. *Id.* ¶ 37 (J.A. 13-14).

Center Moriches responded by relying upon section 414 of the New York Education Law. Center Moriches alleged that this statute precludes the use of school district premises for religious purposes,[5] Answer ¶ 39 (J.A. 21), and that the school district's official rules governing the use of Center Moriches facilities (including the ban on uses for religious purposes) were in conformity with section 414, *id.* ¶¶ 36, 54 (J.A. 20, 23). Center Moriches denied that it had created an open forum and maintained that its Board of Education "controlled" the use of school facilities. *Id.* ¶¶ 42, 45 (J.A. 21, 22). Finally, Center Moriches claimed that it had a "compelling interest" in protecting elementary and secondary students from "proselytizing religious ideas of various religious groups and entities," and that section 414 furthered that government interest. *Id.* ¶¶ 48, 49 (J.A. 22).

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[5] Section 414 does not expressly forbid the use of school premises for religious purposes. *See* Appendix D to Petition for Writ of Certiorari (Pet. App. 52a) (text of statute). A New York appellate court, however, has construed section 414 to authorize the use of school facilities only for "enumerated purposes" and has concluded that because the statute does not explicitly list "religious purposes," no such use is authorized. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

On May 18, 1990, the U.S. District Court for the Eastern District of New York denied Lamb's Chapel's motion for a preliminary injunction. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 736 F. Supp. 1247 (E.D.N.Y. 1990) (Pet. App. 35a).

Lamb's Chapel appealed from the denial of the preliminary injunction. At the suggestion of Staff Counsel for the Second Circuit, however, Lamb's Chapel withdrew its appeal and returned to the district court to obtain a final disposition and to allow the district court to reconsider its denial of injunctive relief in light of *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *See* Pet. App. 17a.

Upon return of the litigation to the district court, Center Moriches clarified in its motion for summary judgment that it relied ultimately upon section 414 of the New York Education Law for its defense:

> In the absence of Section 414 of the Education Law establishing a clear State policy, we would concede that the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other group may be allowed access. However, in the face of Section 414 which limits the access that can be permitted to school district facilities, it is clear that the State has established a policy of precluding use for nonpermitted purposes.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990).

The district court granted summary judgment for Center Moriches. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991) (Pet. App. 16a).

Lamb's Chapel appealed to the U.S. Court of Appeals for the Second Circuit. On March 18, 1992, that court affirmed the entry of summary judgment against Lamb's Chapel. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir. 1992) (Pet. App. 1a).[6]

The Second Circuit ruled that public property may be either a "traditional public forum," a "purposefully opened" public forum (including a "subcategory" of "limited" or "designated" public fora), or a "non-public" forum. *Id.* at 385-86 (Pet. App. 8a-9a). The court of appeals held that Center Moriches school facilities fall "within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." *Id.* at 386 (Pet. App. 10a) (citation omitted).

The court of appeals observed that while New York Education Law section 414 authorizes a variety of uses for public school property, including social, civic and recreational meetings, *id.*, "[r]eligious uses are nowhere permitted in this enumeration," *id.* The court noted that in a prior decision, *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), the Second Circuit had "adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes," *Lamb's Chapel*, 959 F.2d at 387 (Pet. App. 10a-11a) (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414 . . . . Consequently, the Board of Education had no authority to grant petitioners' request to form bible clubs in the public high schools")).[7]

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[6] The New York State Attorney General's Office, which was not a party in the district court, intervened on appeal. *See* J.A. 2 (docket entry for order allowing intervention).

[7] The *Trietley* decision predated both *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, under First Amendment, to university facilities for student religious group), and *Board of*

Pursuant to *Trietley* and *Deeper Life*, the Second Circuit construed section 414 to render public school facilities "a limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387 (Pet. App. 11a) (citation omitted).

Relying upon *stare decisis* with respect to its own precedents, the court of appeals held that in a "limited public forum," government may "impose a blanket exclusion on certain types of speech" so long as it does not "selectively deny access" among "expressive activities of a certain genre," *id.* (internal quotation marks omitted) (citing *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991)). The court held that the only remaining question was whether Center Moriches "has opened its facilities to religious uses and purposes" in the present case. 959 F.2d at 387 (Pet. App. 12a). Declaring this to be "a close question," *id.*, the court reviewed the evidence and concluded that "none of the prior uses" of Center Moriches property "were for religious purposes." *Id.* at 388 (Pet. App. 14a).

The court of appeals did not explain why Lamb's Chapel's planned film series would not be of the same "genre" as social, civic, recreational, or other permitted uses. Nor did the court identify any government interest —compelling, substantial, or even rational—that allegedly supported the exclusion of private users from government facilities solely on the basis of the religious content or purposes of the intended use.

Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) (granting equal access, under federal Equal Access Act, to high school facilities for student religious group). *Trietley* rejected an equal access claim by a high school student bible club. In *Deeper Life*, which also predated *Mergens*, the Second Circuit held that religious groups have no constitutional right of equal access *in general* to public school facilities, but that where—as in *Deeper Life*—the school district has *in fact* permitted prior *religious* uses, other religious groups may have a valid claim to equal treatment.

SUMMARY OF ARGUMENT

Petitioner Lamb's Chapel requested permission to use the facilities of respondent Center Moriches Union Free School District, in order to show a film series, open to the public, on contemporary family issues. Center Moriches refused permission solely because the film series contained a religious perspective. This censorship of religious speech of private actors violates the federal constitutional right to free speech.

A government body creates a "designated public forum" for free speech when it opens government facilities to general use by the public or some segment of the public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Content-based exclusions of speech from such fora are subject to strict scrutiny, i.e., such exclusions are unconstitutional unless narrowly drawn to further a compelling government interest. *Id.* at 45-46.

The Center Moriches school district has, by policy and practice, opened its facilities to a very broad range of outside uses, thereby creating a designated public forum. The school district forbids users of its facilities from engaging in religious speech. This content-based censorship therefore triggers strict scrutiny.

No compelling interest supports the school district's policy of censorship. Granting religious speakers equal access to school facilities does not violate the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). The school district claims that a state statute requires the school district to forbid even private religious speech on school premises. But state law cannot justify the denial of the federal constitutional right to equal access for private religious speech. *Widmar*, 454 U.S. at 276.

The Second Circuit held that Center Moriches was nevertheless free to create a "limited public forum from which religious uses would be excluded." 959 F.2d at 387 (Pet. App. 11a). This holding represents a major distortion of this Court's forum jurisprudence.

Contrary to the Second Circuit, there is no special "subcategory" of religion-free fora. Such a concept is inconsistent with this Court's precedents, inherently circular, and completely unworkable. Administration of such gerrymandered fora would require school officials and judges to screen private party speech to determine whether that speech had religious content (and how much). This sort of subjective, standardless review involves unconstitutionally broad discretion and creates an impermissible risk of *de facto* discrimination between different religions. This Court should forcefully reject the notion that a government body may censor out the religious speech of private parties, so long as it does so "consistently."

The undisputed record establishes that Lamb's Chapel is eligible, in general, to use Center Moriches facilities, and that the topic Lamb's Chapel wishes to address—contemporary family concerns—is well within the scope of permissible subject matter in the relevant forum. Hence, the Center Moriches facilities are a public forum as to Lamb's Chapel, *Widmar*, 454 U.S. at 267, and the school district's content-based exclusion of Lamb's Chapel triggers—and fails—strict scrutiny, *id.* at 267-70.

The Center Moriches policy of anti-religious discrimination would also be unconstitutional even if the facilities in question were deemed "nonpublic fora" for purposes of free speech. In a nonpublic forum, government may limit access "based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*," *Cornelius v. NAACP Legal Defense*

and Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (emphasis added). But in the present case, Center Moriches has no restriction applicable to either the subject matter (family issues) or the speaker (an outside church organization) in question. Instead, Center Moriches has enforced a restriction which is *unreasonable* and constitutes *viewpoint* discrimination (censoring out speech solely because of its religious *perspective*). Hence, the school district's policy fails even the test for nonpublic fora.

Even aside from forum analysis, the Center Moriches policy violates the First Amendment. The school district has engaged in content-based censorship of pure speech, which is presumptively unconstitutional. Religious speech is entitled to full and equal protection under the First Amendment. The school district's censorship of religious speech triggers strict scrutiny, a standard the school district's policy cannot satisfy.

Finally, by targeting private religious speech for censorship from facilities made available to the public, Center Moriches has violated the Establishment Clause of the First Amendment. Government denial of equal access for religious speech demonstrates hostility toward religion, *Mergens*, 496 U.S. at 248 (plurality); furthermore, the screening involved in a policy of religious censorship produces excessive entanglement of government officials with religious questions, *id.*, *Widmar*, 454 U.S. at 272 n.11.

ARGUMENT

It is a fundamental proposition of constitutional law that a government body may not suppress or exclude the speech of private parties for the sole reason that the speech contains a religious perspective. *Widmar v. Vincent*, 454 U.S. 263 (1981). To deny this bedrock principle would be to eviscerate the essential guarantees of free speech and religious freedom under the First Amendment.

This case presents the specific question whether a public school district, which makes its facilities generally available for the activities of non-school community groups during non-school hours, may deny permission to use school facilities to show a film solely because of the religious content of that film. The Second Circuit erroneously upheld precisely such content-based discrimination against religious speech. This Court must reverse that judgment.

Petitioner Lamb's Chapel wishes to show a film series on issues confronting modern families. If this *same* entity (Lamb's Chapel) were to seek to address the *same* topic (contemporary family issues) through the *same* medium (a film series), with the single difference that the film omitted all references to a religious perspective, Center Moriches would have no objection to the use of its facilities under the same terms as any other use by outside groups. But because the film series includes a religious point of view, Center Moriches has refused permission to show the film. This is blatant and unconstitutional government censorship of private religious speech.

I. THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM A FORUM SOLELY ON THE BASIS OF ITS CONTENT IS UNCONSTITUTIONAL REGARDLESS OF THE NATURE OF THE FORUM.

The Second Circuit held that the school facilities of Center Moriches are not public forum property for purposes of free speech, even though Center Moriches has

made these facilities available, by policy and practice, for a virtually limitless variety of social, civic, and recreational uses by the local community. This holding is inconsistent with the public forum jurisprudence of this Court under the First Amendment. But even if the school facilities in question did not constitute public fora, the school district's discriminatory exclusion of religious speech would still be unconstitutional.

This Court regularly employs "forum" analysis in resolving claims of access to public property for purposes of free speech. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic"). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and school board meetings opened for citizen input, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

Under the principles this Court has enunciated in prior cases, the school district facilities are "designated public fora" for purposes of free speech. It follows that the school district's content-based exclusion of religious speech triggers strict scrutiny, a constitutional standard that this school district policy cannot satisfy. But even if the facilities were deemed to be "nonpublic" fora, the school district's policy could not meet the governing constitutional standards.

A. The Center Moriches Policy Represents Unconstitutional Content-Based Discrimination Against Speech in a Designated Public Forum.

The school district facilities at issue here are designated public fora. The district's selective, content-based exclusion of religious speech therefore triggers strict scrutiny, i.e., the school district must demonstrate that its policy of religious discrimination is narrowly drawn to further some compelling government interest. The school district's policy in the present case fails this rigorous standard and is therefore unconstitutional.

1. *The Center Moriches school facilities are designated public fora.*

Public school facilities become designated public fora when "school authorities have 'by policy or practice' opened those facilities 'for *indiscriminate use by the general public*,' . . . or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (emphasis added; citation omitted).

In the present case, both policy *and* practice compel the conclusion that the facilities at issue are designated public fora.

a. *Policy*

New York state law explicitly authorizes "social, civic, and recreational" use of school facilities by the community. N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a).

Pursuant to this statute, the official policy of Center Moriches likewise makes school facilities available for "social, civic, or recreational use." Rules & Regs. # 10 (Pet. App. 57a). Thus, by its official policy, Center Moriches has created "a forum generally open to the public," *Perry*, 460 U.S. at 45, i.e., a designated public forum, *id.* Indeed, it would be difficult to imagine a more expansive use policy than one explicitly open to any "social, civic, or recreational use."

b. *Practice*

It has been the consistent practice of Center Moriches to allow a wide diversity of outside groups to use its facilities. *See supra* pp. 4-5. *See also* J.A. 25, 26, 93, 95-99, 110-38, 149-79 (samples of groups approved for use of school facilities). Everyone from the local humane society, to a labor union, to the girl scouts, have been permitted to use school facilities for a potpourri of purposes and activities. In fact, there is no evidence that Center Moriches denied access to *anyone* before it refused Lamb's Chapel's request to show a film series. This is a classic example of "indiscriminate use by the general public," *Hazelwood*, 484 U.S. at 267.

Thus, both policy and practice demonstrate that the Center Moriches school facilities are designated public fora.[8]

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[8] Applying this same logic, the federal courts of appeals for the First, Third, Fourth, and Fifth Circuits have held that school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing public fora. *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978). District courts in at least three other federal circuits have held the same. *Knights of the Ku Klux Klan v. Martin Luther King Jr. Wor-*

2. *The content-based exclusion of speech from a designated public forum triggers strict scrutiny.*

Government authorities may not exclude otherwise eligible speakers from designated public fora solely on the basis of the *content of their speech* unless the selective exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citation omitted). *Accord Perry*, 460 U.S. at 46. Such content-based censorship will be, in all but the most exceptional circumstances, inevitably unconstitutional:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control. . . .
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted).

The Center Moriches policy is therefore subject to "strict scrutiny," i.e., that policy is unconstitutional unless narrowly drawn to further some compelling government interest.

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shippers, 735 F. Supp. 745, 752 (M.D. Tenn. 1990); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187 (D. Nev. 1988); *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983). Petitioners are aware of no federal court outside of the Second Circuit that has held to the contrary.

3. *The Center Moriches policy of religious censorship furthers no compelling interest; hence, the policy fails to satisfy strict scrutiny.*

Center Moriches has proferred no compelling interests that could justify its content-based exclusion of religious speech.

a. *There are no compelling Establishment Clause concerns.*

In its answer, Center Moriches asserted a "compelling interest" in "protecting" its students from "proselytizing religious ideas." Answer ¶¶ 48, 52 (J.A. 22, 23). Center Moriches has apparently abandoned this argument, and with good reason: it has no force in this case. Permitting religious speakers equal access to a designated public forum is completely compatible with the Establishment Clause of the First Amendment.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that granting student religious groups equal access to university facilities would not violate the Establishment Clause; accordingly, that Clause provided no valid justification for the denial of equal access to religious groups. *Id.* at 270-76.

The fact that the present case involves high school facilities makes no difference. In *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court held that equal access by *high school students* to school facilities for religious purposes was fully compatible with the Establishment Clause. It follows *a fortiori* that equal access by members of the *general public* to school facilities raises no concern under the Establishment Clause.

b. *State law cannot supersede federal constitutional rights.*

Center Moriches relies primarily upon state law to justify its policy. Indeed, in its brief supporting summary judgment, Center Moriches went so far as to con-

cede that "[i]n the absence of Section 414 of the [New York] Education Law . . . the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other groups may be allowed access." Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990). But under the Supremacy Clause, U.S. Const. art. VI, cl. 2, a state statute cannot trump petitioners' federal constitutional rights.

In *Widmar*, this Court specifically rejected the argument that a government body may deny equal access in the name of a compelling interest in following a state law mandate for "greater separation of church and state," 454 U.S. at 276. Any such state interest is necessarily "limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against . . . religious speech." *Id.*

4. *The Second Circuit's approval of a "religion-free" designated public forum represents an unconstitutional distortion of public forum doctrine.*

The Second Circuit sidestepped the strict scrutiny test in this case by creating a new species of forum: the "limited public forum from which religious uses would be excluded." 959 F.2d at 387 (Pet. App. 11a). This unprecedented mutation of a designated forum is incompatible with the First Amendment, gravely unworkable, and ultimately circular in its "logic."

a. *Correct application of the concept of "limited public forum" demonstrates the unconstitutionality of the Center Moriches policy.*

It is helpful first of all to recall the proper significance of the term "limited public forum."

A "limited" public forum is simply another label for a "designated" public forum—i.e., a forum which govern-

ment opens for general use for a "limited" category of speakers, media, or subjects. Thus, for example, a university might make its facilities available "limited" only to student groups, *Widmar*, 454 U.S. at 267 n.5, or a municipality might create a facility "limited" to dramatic productions, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, or a government body might open an official meeting to public comment "limited" to subjects of official business, *e.g.*, *Madison Joint School Dist.*

In these limited public fora, two different sets of rules apply: on the one hand, exclusion of *eligible* speakers, i.e., those who meet the limiting criteria, must satisfy the constitutional standards for *public* fora, *e.g.*, *Widmar*, 454 U.S. at 267-70 (having opened its facilities to students, university must, "[w]ith respect to persons entitled to be there," justify content-based exclusions under strict scrutiny); on the other hand, exclusions of *ineligible* speakers, i.e., those who do not meet the limiting criteria, need only satisfy the constitutional standards for nonpublic fora, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) ("limited" public forum is public forum only for "entities of similar character" to those granted access).

In the case at bar, Center Moriches has not questioned Lamb's Chapel's eligibility, *as an entity*, to use school facilities. The Center Moriches policy makes school facilities available to "[o]utside not-for-profit organizations," Rules & Regs. (Pet. App. 56a), with no suggestion of a special exception for churches. A representative of Center Moriches acknowledged that churches may use school facilities, at least for "non-religious" purposes, Tr. 69-71 (testimony of district clerk and business manager Mrs. Alice Schoener), and Center Moriches has in fact permitted church groups to use its facilities for athletics (St. John the Evangelist Church, J.A. 164), for concerts (Hampton Council of Churches, J.A. 93), and

for family counseling ("Family Counseling Services," J.A. 133). Nor can Center Moriches make the implausible claim that the showing of a film on contemporary family issues, open to the public, is not a "social, civic, or recreational use" permitted under state law and its own policy. The sweeping term "social, civic, or recreational" cannot reasonably be construed to exclude such a classic social and civic subject as the family; likewise, the showing of a film on the topic of the family fits easily into the scope of "social, civic, and recreational" uses. Center Moriches, furthermore, has already permitted the use of its facilities for family counseling (J.A. 133), for a strategy meeting on helping needy families (J.A. 123), and for assisting parents to "get in touch with children's feelings" (J.A. 128). Obviously, family issues are fair game for speakers using Center Moriches facilities.

In view of the policy and practice of Center Moriches, then, it cannot be disputed that Lamb's Chapel constitutes an "entity of similar character" that wishes to engage in an activity of the sort permitted in the forum. It follows that the exclusion of Lamb's Chapel must meet the standards governing public fora. *Widmar*, 454 U.S. at 267-68. The content-based exclusion in the present case accordingly triggers—and, as demonstrated above, fails—the strict scrutiny standard. *Id.* at 269-70.

b. *The Second Circuit incorrectly applied the concept of "limited public forum."*

The Second Circuit declined to apply the doctrine of designated public fora in this manner. Instead, the court below interpreted "limited public forum" to be, not a *synonym* for "designated public forum," but instead a

[*] Family Counseling Services is a non-sectarian agency operating under the "umbrella" of the Hampton Council of Churches. Tr. 176 (testimony of Ruth Bragarnick, Director of Development for Family Counseling Services). *See also* Plaintiffs' Ex. 9a (J.A. 93).

special *subcategory* of designated public fora. 959 F.2d at 386 (Pet. App. 10a).

This "subcategory" represents, in the present case, "limited forums not opened to religious uses," *id.* at 388 (Pet. App. 14a).

This novel subcategory embodies the Second Circuit's aberrant approach to the question of religious access to school facilities. According to the Second Circuit, a government body is free to create a "religion-free forum" for private speakers, so long as the government exclusion of religion is *consistent*. Thus, in *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the Second Circuit held (prior to *Mergens*) that a high school could exclude a student religious club so long as it excluded all *religious* organizations: "since all religious groups are equally denied access to school facilities, any equal protection argument lacks merit." *Brandon*, 635 F.2d at 980 (citation omitted). In *Deeper Life Christian Fellowship, Inc. v. Board of Education*, 852 F.2d 676 (2d Cir. 1988), the Second Circuit held that a church could have a constitutional right to access to school facilities for religious purposes only if the school had engaged in a practice of granting permits "to other *religious* organizations," *id.* at 680 (emphasis added). And in *Travis v. Owego-Apalachin School District*, 927 F.2d 688 (2d Cir. 1991), the Second Circuit held that a school that had permitted previous *religious* uses could not selectively deny access to a new religious speaker, *id.* at 693, unless the school "expressly adopts a new policy that treats all programs with a religious theme equally," *id.* at 694.

In essence, the Second Circuit has created a regime of religious nonreligious apartheid for private speakers. School districts may treat private religious speech as second-class speech, so long as the school districts "discriminate evenhandedly" against *all* religious speech. Thus, in the present case, the Second Circuit sanctioned

the attempt of Center Moriches to create "religion-free limited public fora." To determine if the exclusion of Lamb's Chapel's speech was constitutional, the Second Circuit concluded that it needed only to resolve "[w]hether Center Moriches has opened its facilities to religious uses and purposes," 959 F.2d at 387.

The Second Circuit's approach is inconsistent with precedent, inherently circular, and completely unworkable.

As noted above, there is no separate category of "limited public forum" distinct from "designated public forum." The Second Circuit's innovation represents a departure from the consistent teaching of this Court that there are only three categories of forum: the traditional public forum, the public forum by designation, and the nonpublic forum. *E.g.*, *ISKCON v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry*, 460 U.S. at 45-46. The creation of a new, fourth category of forum can only serve to confuse and complicate the application of this Court's public forum doctrine.

The Second Circuit's approval of a "religion-free forum" also flies squarely in the face of this Court's *Widmar* decision. In *Widmar*, the university explicitly "limited" the forum—university facilities—by excluding religious uses. 454 U.S. at 265 & n.3. This Court nevertheless held that the facilities in question were a designated public forum open to all student groups. *Id.* at 267.

The rationale of the Second Circuit is also badly circular: *any* content-based exclusion of speech from a designated public forum would be permissible if that same exclusion could serve to redefine the forum and thereby justify the exclusion. Center Moriches asserts that "the State has established a policy of precluding uses for non-permitted purposes." Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1992). But this

is no more than a tautology which contributes nothing to the constitutional analysis.

Finally, the Second Circuit's approach is unworkable to the point of being gravely dangerous to religious freedom.

The Second Circuit has placed itself—as well as district courts and school officials—in the awkward position of screening the content of private speech in search of religous elements. School officials must judge what is and is not religious in order to decide what to forbid. The courts must then second-guess those judgments in order to determine whether the school has been sufficiently "consistent" in censoring out references to God, Christianity, etc. Judges and school administrators will be hard pressed to identify the line the Second Circuit perceived to exist between "[i]ncidental references to religious figures," 959 F.2d at 388 (Pet. App. 13a), and forbidden "religious purposes"; between the "occasional use of religious terms," *id.*, and impermissible religious speech; between "religious overtones," *id.*, and illegal religious content. Indeed, it is highly doubtful whether the Second Circuit's standard of "religious in any meaningful way," *id.* (Pet. App. 14a), supplies a test that is in any way meaningful.

One major consequence of this extremely murky standard, aside from unworkability, is the enormous potential for *de facto* discrimination among religions. Can government officials be expected to apply a uniform scale to measure the "religiosity" of disparate forms of expression?[10] Does such a scale even exist? If not—which seems clear—the Second Circuit's test licenses the sort

[10] When is a song religious? How about a play? How many references to Buddha are permitted? Would the same number apply to Christ? To Zeus? Does it matter whether anyone in the local community subscribes to the relevant faith? What about attacks, either on religion in general or on one faith in particular—are they permitted?

of standardless discretion that creates an unconstitutional risk of discrimination among religious faiths. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating policy restricting religious speech in public park, where officials had *de facto* discretion to discriminate among religions by deciding what was and was not religious); *Widmar*, 454 U.S. at 272 n.11 (determining what speech is "religious" could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion") (internal quotation marks and citation omitted).[11] This mandatory religious review process is no proper business of government officials; indeed, it is a classic example of unconstitutional government entanglement with religion, *see infra* § III.

The proper application of public forum doctrine avoids these constitutional and administrative nightmares. Instead of engaging in content-review and standardless balancing, a court should simply determine whether legitimate, neutral criteria define the forum, and whether the would-be speaker meets those criteria. One's right to equal access to a forum should not depend upon one's willingness to surrender the right to speak in a manner that is "religious in any meaningful way."

The Center Moriches policy clearly fails to meet the standard for content-based exclusions from a designated public forum.

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[11] In the present case, for example, the Second Circuit drew a distinction between religious references in Lamb's Chapel's film about family issues, on the one hand, and a number of other uses that are arguably at least equally religious, on the other. Thus, the court below concluded: that a Salvation Army Band concert, complete with invocation and rendition of "Jericho Revisited" and "God Bless America," Tr. 38, was *not religious*, 959 F.2d at 387; that a Gospel Music Concert, replete with religious songs and hymns, Tr. 50, 52, was *not religious*, 959 F.2d at 387-88; and that a lecture series on parapsychology, Kundalini (a Hindu concept), and "spiritual effusion," Tr. 82-83, 85, was *not religious*, 959 F.2d at 388.

B. The Center Moriches Policy Would Be Unconstitutional Even if the School Facilities were Nonpublic Fora.

Even if the school facilities at issue were deemed nonpublic fora, the school district's policy would fail the governing constitutional test.

The court below effectively held that the school facilities of Center Moriches are nonpublic fora as to Lamb's Chapel. Although the court purported to hold that the facilities were a "limited public forum," the Second Circuit made it clear that, in its view, Center Moriches facilities constitute a "non-public forum" as to activities with religious contents or purposes. 959 F.2d at 386 (Pet. App. 10a). Even if this content-based forum analysis reflected proper constitutional doctrine—which it does not—the *per se* exclusion of religious speech by private persons would still fail the test for exclusions from nonpublic fora.

This Court has explained that "[c]ontrol over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). The exclusion in the present case fails even this deferential standard.

First, the discrimination in this case is not based on either *subject matter* or *speaker identity*. Lamb's Chapel wishes to show a film series on the issues confronting families in the modern age. If this *same* entity (Lamb's Chapel) proposed to address the *same* topic (the family), through the *same* medium (a film series), with the solitary difference that there were no references to a religious perspective, the activity would clearly be unobjectionable to Center Moriches. *See supra* § I(A)(4)(a) (churches permitted to use school facilities); *id.* (family issues are proper subject matter for speech in school

facilities). Center Moriches is not engaging in speaker or subject selection, but in direct, unadulterated, censorship.

Second, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*.[12] A rule banning religious speech is patently content-based. But as the facts of this case make clear, the selective exclusion of Lamb's Chapel's speech because it presents a religious perspective on an otherwise permissible subject is necessarily viewpoint-discriminatory as well. Lamb's Chapel is free to address the identical topic—the family in the modern world—*so long as it does not do so from a religious viewpoint*. A more flagrant policy of viewpoint exclusion would be difficult to imagine. As this Court explained in *Cornelius*, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806.

Third, there is simply *no reasonable basis* for the *per se* exclusion of speech by private actors based upon its religious content. Center Moriches claims to rely upon a state statute in defense of its discriminatory policy. In light of the federal Supremacy Clause, however, this statute can provide no rational defense. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in school facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. Center Moriches has offered no other colorable rationale for its censorship of private religious speech. Nor did the Second Circuit propose any legitimate basis for the school district's discriminatory policy.

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[12] *Accord May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view).

Ultimately, Center Moriches is claiming the sheer power to exclude private religious speech for no better reason than just because Center Moriches says so. This assertion of a stark power of anti-religious discrimination is incompatible with the Constitution under any standard. *Accord Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1382 n.14 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) ("While we have . . . applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by [the school district] for excluding [the religious group] could withstand review even under a rational basis standard"); *May*, 787 F.2d at 1113 (the "contention—that the school discriminates arbitrarily against one type of speech, religious speech—would if true establish an abridgment of free speech however one classifies the [school facilities] along the range of public-private forum").

II. THE CENTER MORICHES POLICY IS AN UNCONSTITUTIONAL CONTENT-BASED CENSORSHIP OF PURE SPEECH.

The preceding section of this brief demonstrates the unconstitutionality of the Center Moriches policy under "forum" analysis. Even apart from the First Amendment forum doctrine, however, the policy in question represents unconstitutional content-based censorship of pure speech.

Strictly speaking, this Court need not engage in forum analysis in order o decide this case. The school district has not denied Lamb's Chapel access *per se*, but has instead sought to *censor out* only the religious *speech* of an otherwise eligible speaker. In such a case, the government has infringed upon pure speech, and resort to forum analysis is unnecessary. *E.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (overturning content-discriminatory prohibition of student expression; no

forum analysis); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (overturning ban on "First Amendment activities" regardless of forum status of airport terminals); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (overturning content-discriminatory ban on fighting words even where forum is private property and expression constitutes illegal fighting words). *Compare Carey v. Brown*, 447 U.S. 455 (1980), *with Frisby v. Schultz*, 487 U.S. 474 (1988) (content-discriminatory ban on residential picketing unconstitutional even though content-neutral ban on single-residence picketing is permissible).

The Second Circuit held that a public school district may deny outside organizations equal access to the after-school use of its facilities solely on the basis of the religious content or purpose of the planned use. The necessary premise of this holding is the proposition that government may relegate religious speech to second-class status under the First Amendment. This has never been the law.

On the contrary, this Court has consistently upheld protection for religious speech in a wide variety of contexts, with no suggestion that the religious content of that speech in any way limited the full force of First Amendment guarantees. *See, e.g., Lee v. ISKCON*, 112 S. Ct. 2709 (1992) (per curiam) (distribution of religious literature in airport terminals); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (same); *Marsh v. Alabama*, 326 U.S. 501 (1946) (distribution of religious literature in company town); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious speech in public park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Saia v. New York*, 334 U.S. 558 (1948) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (door-to-door religious canvassing); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (same); *Largent v. Texas*, 318 U.S. 418 (1943) (same); *Schneider v. State*,

308 U.S. 147 (1939) (same); *Jamison v. Texas*, 318 U.S. 413 (1943) (distribution of religious literature in public places); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (same); *Kunz v. New York*, 340 U.S. 290 (1951) (street preaching); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

This is not to say, of course, that a speaker is automatically free from otherwise lawful regulation simply because the speaker communicates religious sentiments.[13] *E.g., ISKCON v. Lee*, 112 S. Ct. 2701 (1992) (upholding ban on solicitation in airport terminals); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (upholding limitation on solicitation at state fairgrounds); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor law to distribution of literature).[14]

But at a minimum, the First Amendment precludes any governmental effort to single out and censor—or otherwise burden—the speech of private parties *solely because that speech is religious*. Thus, a city might forbid public assemblies on jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966), but may not forbid *only* public assemblies for *religious* purposes. An army base might proscribe leafletting, *Greer v. Spock*, 424 U.S. 828 (1976), but not *only* the distribution of *religious* tracts. An airport might ban solicitation in its terminals, *ISKCON v. Lee*, 112 S. Ct. 2701 (1992), but not *only* solicitation for *religious* causes.

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[13] It would likewise be error—though at the opposite extreme—to claim that religious activity has *no* claim to special recognition under the Constitution. So to hold would be to render the Free Exercise Clause wholly superfluous.

[14] In contrast to *private* actors, *government* actors acting in their official capacity do not always enjoy the same freedom to engage in religious speech: "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," *Board of Educ. v. Mergens*, 496 U.S. at 250 (plurality) (emphasis in original).

In short, when a government body makes its facilities available for the expressive activities of private parties, it may not selectively exclude users solely on the basis of the religious content of their speech or activities. *Widmar v. Vincent*, 454 U.S. 263 (1981) (selective exclusion of student religious groups from university facilities violates First Amendment).

In the present case, New York state law explicitly authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments" which are "open to the general public," N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a). The official rules and regulations of Center Moriches likewise authorize community groups to use school premises for, *inter alia*, "social, civic, or recreational use. . . ." Rules & Regs. #10 (Pet. App. 57a). And in practice, Center Moriches has made its facilities available for a great variety of social, civic, and recreational activities by numerous groups (e.g., the Manorville Humane Society, the Unkechaug Dance Group, the Moriches Bay Civic Association, the Chamber of Commerce, the Southern Harmonizers Gospel Group, etc.). There is no question that Lamb's Chapel, *as an entity*, is eligible to use school facilities for "social, civic and recreational meetings."

Nevertheless, Center Moriches has singled out Lamb's Chapel's planned public showing of a film series for discriminatory exclusion solely because that film presents a religious perspective on contemporary family issues. The school district expressly forbids the use of school facilities for religious purposes, Rules & Regs. # 7 (Pet. App. 57a), and the school district has interpreted this prohibition to bar the showing of a film series *with religious content*.

Such content-based censorship of private religious speech is arguably unconstitutional *per se*. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 512-14 (1991) (Kennedy, J., concurring) (suggesting that First Amendment ban on content-discrimination is absolute).[15] At a minimum, however, such censorship of pure speech is presumptively unconstitutional and subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549-50 (1992).

As explained in this brief, *supra* § I(A)(3), the Center Moriches policy of antireligious censorship cannot withstand strict scrutiny review. Accordingly, that policy is unconstitutional.[16]

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[15] "*Any* restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[16] The clarity of the constitutional rule in this particular context is such that the federal courts of appeals—other than the Second Circuit below—have uniformly recognized and upheld the equal access rights of religious speakers in factual settings indistinguishable from the present case:

—the First Circuit held, in *Grace Bible Fellowship, Inc. v. Maine School Administrative District #5*, 941 F.2d 45 (1st Cir. 1991), that a policy not to lease school facilities to outside groups for activities "for the direct advancement of religion" was unconstitutional;

—the Third Circuit held, in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), that a school policy which forbade use of school facilities by outside groups "for religious services, instruction, and/or religious activities" was unconstitutional; and,

—the Fifth Circuit held that public school facilities which are made available to a variety of outside groups constitute a public forum for free speech, *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), and that in such public forum property, a policy excluding religious groups is unconstitutional, *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (library auditorium).

The Seventh Circuit has strongly suggested, albiet in *dicta*, that it would embrace the same rule. *May v. Evansville-Vanderburgh*

III. THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES VIOLATES THE ESTABLISHMENT CLAUSE.

The Second Circuit summarily rejected Lamb's Chapel's argument that the selective exclusion of religious speech on the basis of its content violates the Establishment Clause. 959 F.2d at 389 (Pet. App. 15a). This holding conflicts with the relevant decisions of this Court.

First, a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality). *Accord Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1380 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45, 48 (1st Cir. 1991). The Establishment Clause of the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.*

School Corp., 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional). *Cf. Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288, 290 (8th Cir. 1984) (rejecting equal access claim because use permit was withdrawn on strictly procedural grounds and the "school district policy does not deny access to school facilities to religious groups"). *See also Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (overturning policy banning use of school facilities "for religious worship or other religious purposes").

Petitioners are aware of no federal court outside of the Second Circuit that has reached a contrary conclusion. Nor could a contrary view square with the Constitution.

Second, a policy of equal access for religious speech "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (plurality) (emphasis in original; citation omitted). Center Moriches would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion. As this Court explained in *Widmar*, an educational institution which excludes private religious speech

> would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Gregoire*, 907 F.2d at 1381; *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983).

The ultimate purpose of the Establishment Clause was the safeguarding of religious exercise against the power of the state. The present case presents a classic instance of explicit government oppression of religion. By sustaining this unconstitutional government policy, the Second Circuit disregarded the teachings of *Widmar*, *Mergens*, and other decisions of this Court construing the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit.

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